MDTC

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

June 12, 2013

The Honorable Kevin Cotter
Chairman, House Judiciary Committee
Anderson House Office Bldg.
124 N. Capitol
S-1288 House Office Building
Lansing, MI 48933

Dear Chairman Cotter and Members of the Committee:

On behalf of our Membership, the Executive Committee of the Michigan Defense Trial Counsel ("MDTC") has examined and analyzed the recently introduced package of Bills (HBs 4770, 4771 and 4772) aimed at remedying the deplorable business model of service providers employing "runners" or "cappers" to solicit and pitch recently injured accident victims with promises of "cost free" medical care that will be covered by insurance. This deceptive practice, often cloaked as "pain relief", preys on victims during their most vulnerable state and unnecessarily drains resources out of our state's already over-burdened No Fault Insurance system.

While we are unaware of any actuarial data or statistics-based research documenting just how large of a negative financial impact this scheme imposes upon the No Fault system, the anecdotal evidence is compelling: Many medical care providers, and, depressingly, some attorneys, scan Motor Vehicle Traffic Accident Reports on a daily basis to identify auto accident victims in order to glean whether the victim's injuries are covered by a No Fault Insurance Policy, knowing full well that those covered by insurance are likely to accept unnecessary medical care because, after all, someone else will be paying for it.

Before the No Fault Carrier even knows of the accident or the treatment being rendered to the policyholder, the service provider can rack up tens of thousands of dollars of unpaid medical bills that it

then attempts to seek reimbursement for from the Insurance Company. The Carriers, themselves, are faced with large medical bills that, if they refuse to pay, could subject them to Penalty Interest and/or attorney's fees. Often times, faced with the prospect of additional penalties for a wrongful denial, the Carrier cuts its losses by paying a bill that may be inflated or cover unneccessary medical therapies.

As a Member of the Bar, it is sickening that some lawyers are actively engaged in this deceptive, if not fraudulent, scheme, either independently (despite the solicitation prohibitions of Michigan Rule of Professional Conduct 7.3) or in conjunction with the medical care providers through a reciprocal referral network.

This abuse of the No Fault system certainly proves the adage that there is no such thing as a "free lunch." We applaud the efforts of the Legislature to act to remedy this problem with the welcome reforms of House Bills 4770, 4771 and 4772.

Below, we offer our views on the substance of the Bills and voice our support for the goals they attempt to accomplish. However, we also offer a few technical and enforceability concerns we see with the Bills as currently drafted. We urge the Legislature to take into consideration some of the constitutional problems that might result from these Bills' attempts to limit federally protected Free Speech Rights that could arise under HB 4771.

Statement of Interest

MDTC is a non-profit association organized and existing to advance the knowledge and improve the skills of civil defense lawyers and commercial litigators, to support improvements in the adversary system of jurisprudence in the operation of the Michigan Courts as a whole, and to broadly address the interests of the legal community in Michigan. A significant portion of our membership practices in the defense of Personal Injury claims. In fact, many of our members practice exclusively in the defense of claims arising under the No Fault Act. MCL 500.3101 et seq.

While our lawyer members routinely represent individuals, corporations, No Fault Policyholders and No Fault Insurance Carriers in negligence actions, the MDTC is an organization of lawyers, only. The Executive Committee and Board Members owe their fiduciary obligations to the lawyer members of the MDTC, exclusively. We advocate on behalf of our members, first and foremost.

The Position Of The MDTC On House Bill 4770: Support

This Bill seeks to exempt from disclosure Motor Vehicle Traffic Accident Reports for a period of 30 days as a means to curb the predatory practice of scouring these reports for prospective injury victims to target with services. We support the efforts of the Legislature to seek to end this business model, while also making these crucial reports available to those who truly need them for lawful purposes, i.e., law enforcement agencies, insurers, victims and their families and attorneys, as well as members of the media. Moreover, we note that the appellate courts of Michigan have already twice approved similar non-disclosure policies enacted by local governments which also sought to limit the "runner" and "capper" practice.

For example, the Court of Appeals recently agreed with the City of Detroit that it could restrict access to Traffic Accident Reports only to the individuals involved in the accident and their attorneys, insurance agencies and family members. See Michigan Rehabilitation Clinic, Inc v City of Detroit, unpublished Opinion, *per curiam*, of the Court of Appeals (Docket No. 263837). The plaintiff medical provider had routinely engaged in the "runner/capper" practice, using the police reports to identify auto accident victims they could immediately market their services to. The City was fed up with this contemptuous misuse of valuable public records and adopted a policy that prohibited the plaintiff and other similar medical providers from using the availability of these records to prey on the recently injured and vulnerable.

All three Judges of the Court of Appeals agreed that the City's non-disclosure rule was completely

proper and that nothing in the Freedom of Information Act ("FOIA"), MCL 15.231 *et seq*, rendered the municipalities' actions unlawful. The Supreme Court of Michigan decided not to hear this case, leaving the supportive Court of Appeals decision intact.

Likewise, in the case of Larry S Baker, PC v Westland, 245 Mich App 90, 627 NW2d 27 (2001), the Court of Appeals unanimously agreed that the City of Westland was authorized to exempt from disclosure Motor Vehicle Accident Reports and found no FOIA violation. The Court ruled against the plaintiff law firm, which had previously used these reports to identify potential clients, holding that the privacy exemption under FOIA authorized municipalities such as the City of Westland to exempt these traffic reports from disclosure because of the very sensitive personal information contained within them.

Neither of these municipal policies of non-disclosure featured a similar temporary rule of non-disclosure that is included within HB 4770. Rather, Westland and Detroit appeared to cut off access categorically. If anything, HB 4770 is much less restrictive than the policies already approved by our Courts because it is limited as to time, so there should not be any enforcement issues with this Bill.

We note that HB 4770 is more "disclosure friendly" than the non-disclosure policies enacted by the City of Westland and the City of Detroit in other ways--not only because of the temporal limitation, but also because a greater class of persons is exempt from the rule, including members of the media which ought to preemptively short circuit any "Freedom of the Press" violation arguments. Because HB 4770 authorizes more access than those programs already approved by the Appellate Courts, we do not envision any enforcement issues with this particular Bill.

However, while HB 4770 is likely to be held enforceable and compliant with the law and Constitution, we do envision legal tussles under subsections (1) (F) and (G) which seek to authorize certain media professionals to access the Motor Vehicle Traffic Accident Reports within the 30-day non-disclosure period. Given the proliferation of "new

media," including bloggers and other non-traditional journalists, we could envision one such journalist challenging the restriction of subsection (1) (F) and (G) to only the employees of a "newspaper" and employees of a "radio or television station licensed by the Federal Communications Commissions," arguing that they, too, are members of the media who should be allowed to access these reports.

We do not think that this would pose enforcement problems to the Bill as a whole, but we would expect some members of the "new media" to seek to also get their foot in the door and their hands on these reports. We do note that the definition of "newspaper" allows for employees of a newspaper that may exist only on the Internet but we could envision "bloggers" arguing that they, too, are publishers of "newspapers".

The Position Of The MDTC On House Bill 4771: Support

This Bill seeks to make it a crime for any person to prey upon the vulnerability of an accident victim or his family members by soliciting and marketing services to such an individual in a great time of need. The MDTC fully supports this goal and we encourage the Legislature to adopt a Bill that makes this oily practice unlawful. However, we also note that there are some potential enforcement issues with the Bill as currently drafted: One issue is constitutional, the others pertain to the language used in the current draft.

For example, House Bill 4771 makes it a crime for any person to contact an accident victim within 30 days after the event causing the injury with an offer to provide medical care or other rehabilitation services. Technically, under the law, if a medical doctor family member of the accident victim were to reach out to the victim on his or her own offering care, that well-intentioned family member would technically be violating House Bill 4771 and committing a felony in the process. Obviously, the well-meaning family member is not the intended target of this legislation but, as the Bill is currently drafted, such a scenario would fall within the prohibitions of HB 4771. We believe language should be added to this Bill to prevent this unintended consequence.

Furthermore, we also note a couple of other potential problems with the current language. First, we see potential litigation problems with subsection (2)(A) and the manner in which it could be shown that the solicitation was "based upon the knowledge or belief that the individual has sustained as personal injury. . . " We envision service providers who employ a "mass marketing" strategy getting caught up in this language and having difficulty proving that the solicitation was not specifically targeted to an individual. Conversely, we could also envision how the bad intentioned medical care providers could make it appear that their target solicitation was actually part of a broader campaign in an attempt to escape the reach of the statute.

Second, in this day and age, the Supreme Court of the United States has a view of the First Amendment that borders on religious fervor and this reverance has been applied to repeatedly strike down any perceived infringements on Free Speech Rights. See, for example, US v United Foods, Inc, 533 US 405, 121 SCt 2334 (2001) (regulation of commerical speech pertaining to the marketing of mushrooms struck down on constitutional/commercial speech grounds); Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999) (restriction on advertisements for casino gambling struck down); Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) (beer label ban held unconstitutional); Citizens United v FEC, 558 US 310, 130 SCt. 876, 912-13, 175 LEd2d 753 (2010) (campaign finance regulations struck down on first amendment grounds).

There are also parallel cases striking solicitation bans that share some of the features of HB 4771. See, for example, Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (blanket ban on direct, in-person, uninvited solicitation by certified public accountants held unconstitutional); Pruett v. Harris County Bail Bond Bd., 499 F.3d 403 (5th Cir. 2007) (certain restrictions on ability of bail bondsmen to solicit recent arrestees held violative of the first amendment).

However, there is some good news: deceptive or mis-informed speech is not constitutionally protected as "commercial speech" and a number of statutes that have been aimed at curbing the use of misinformation to solicit customers have been upheld. See, for example, Goodman v. Illinois Dept. of Financial and Professional Regulation, 430 F.3d 432, 437 (7th Cir. 2005) (ban on univited solication of chiropractic services to recently injured accident victims upheld where the plaintiff chiropractor could not show that its sales pitch was truthful); Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd., 632 F.3d 212, 218 (5th Cir. 2011) (ban on attorney solicitation that promised success held proper because a guarantee of results is inherently misleading); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.")

In one case, the Supreme Court of Florida struck down a similar ban on solicitation when insurance benefits are available for failing to include a scienter requirement as an element of the offense. State v. Bradford, 787 So.2d 811, 815 (Fla 2001) ("we hold that because the Legislature did not include fraudulent intent as an element of unlawful insurance solicitation, the statute at issue unconstitutionally infringes upon the protections afforded commercial speech by the First Amendment to the United States Constitution.")

It is our opinion that House Bill 4771 would be characterized as an attempt to infringe on Commercial Speech, and that a challenge to HB 4771 would need to be overcome on this basis. The Bradford decision offers a useful template if there any to be any revisions to HB 4771 to include a fraudulent intent requirement that would lessen the chances of HB 4771 from being held to constitute an unlawful infringement on commercial speech.

We support the legislative goals of HB 4771 and recommend that it be revised so as to avoid as greatly as possible any attempts to seek to invalidate the law on First Amendment grounds.

The Position Of The MDTC On House Bill 4772: No Position

We take no position on the Sentencing Guidelines contained within HB 4772. Criminal law is an area where we do not have expertise.

Conclusion

It is the view of the Executive Committee of MDTC that HBs 4770 and 4771 should be adopted with consideration given to the enforcement/constitutional concerns raised above. We greatly appreciate the opportunity given to us to offer our views and are available for further consultation or analysis if needed.

Sincerely

Timothy A. Diemer,
President MDTC

Cc: Sponsors of HB 4770, 4771 and 4772, Representatives Lipton, Graves, Rendon, Schmidt, Hovey-Wright, Slavens, Knezek and Oakes